NO. 45496-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY ROBINSON,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

The trial court erred when it denied the defendant's motion to dismiss because the state's knowing failure to meet the discovery requirements of CrR 4.7 and *Brady v. Maryland* constituted prosecutorial misconduct and denied the defendant his right to a speedy trial.

Issues Pertaining to Assignment of Error

Does a trial court err if it denies a defendant's motion to dismiss when the state's misconduct in failing to meet the discovery requirements of CrR 4.7 and *Brady v. Maryland* denies that defendant a speedy trial?

STATEMENT OF THE CASE

Factual History

On February 24, 2013, at approximately 1:00 in the morning, Washington State Trooper James O'Connor was on patrol on Highway 3 in Kitsap County when he stopped a small blue pickup for failure to signal a lane change while pulling on to the highway. RP 58-62.[1] Once the pickup stopped Trooper O'Connor approached the passenger's side of the vehicle and conversed with the lone male driver. RP 63-65. According to Trooper O'Connor the driver produced registration for the vehicle, stated that he did not have his driver's license with him, identified himself as Jeffrey D. Robinson, and gave 5/10/69 as his date of birth. RP 65-68. Jeffrey D. Robinson is the defendant's name and 5/10/69 is his date of birth. RP 237-238, 250-251. Trooper O'Connor then ran the name and birth date and learned that (1) there was a Jeffrey D. Robinson in the system with the birth date listed, (2) he had a valid driver's license, (3) the driver of the truck appeared to match the physical characteristics that the communications center

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[1]The record on appeal includes the following seven volumes of verbatim reports. The first two are of the trial that began on August 20, 2013, and ended in a mistrial the next day. These are referred to herein as "RP [date] [page #]." The next four are of the second trial that began on September 30, 2013, and ended four days later on October 3, 2013. They are referred to herein as "RP [page #]." The last is of the sentencing hearing held on October 18, 2013. It is referred to herein as "RP 10/18/13 [page #]."

gave from the driver's record for Jeffrey Robinson, and (4) that there were no warrants outstanding for Jeffrey D. Robinson. RP 65-71. Based upon this information Trooper O'Connor gave the driver a verbal warning and let him proceed on his way. RP 69-71. A few hours later Trooper O'Connor finished his shift and went home. RP 73.

The next evening Trooper O'Connor returned to work to find a message to contact Sergeant Halsted of the Poulsbo Police Department, who reported to him that earlier that day Poulsbo Police Officer Sabado had taken a stolen vehicle report on the blue pickup that Trooper O'Connor had stopped that morning. RP 74-75, 80, 217-218. Trooper O'Connor then went to the communications center, reviewed a copy of the driver's license photograph for the defendant, and told Sergeant Halsted that the defendant was the person he had stopped early that morning. RP 76-78,

Tooper O'Connor later spoke over the phone to Officer Sabado and told him what he could remember about the stop of the pickup, including the name and date of birth that the driver had used and the fact that there was a black cane on the seat. RP 219-221. At Officer Sabado's request, Trooper O'Connor then gave the following description for the driver: approximately 5'10" tall, long brown curly shoulder length hair, and very brown teeth as if a heavy smoker or methamphetamine user. RP 221-224. Officer Sabado wrote down the description as Trooper O'Connor gave it. *Id.* Trooper

O'Connor did not claim that the person had any scars on his face or that he had a blotchy or pitted complexion. *Id.*

Based upon Trooper O'Connor's statements Sergeant Halsted went to the defendant's home and arrested him for possession of a stolen truck. RP 116. Upon arrest the defendant denied that he had anything to do with the stolen pickup or that he had been driving. RP 117-118. In fact, the previous year the defendant had suffered a fairly serious industrial accident that left him weak and unsteady on his feet. RP 118-120, 130-131, 229-233, 237-240. Then in January he fell because of his balance problems and broke his ankle. RP 239-240. After that he began using a walker to move about, progressed to crutches, and then started using a cane. RP 229-233. During February he rarely drove his own vehicle and relied upon family and friends to get him to his various medical and rehabilitation appointments. RP 238-240. Although he did have a cane and occasionally used it, it was not black. RP 232-233, 248.

Procedural History

By information filed May 7, 2013, the Kitsap County Prosecutor charged the defendant Jeffrey Robinson with one count of Possession of a Stolen Vehicle. CP 1-2. Eight days later the defendant appeared for arraignment with his court-appointed attorney and pled not guilty. CP 6. At that time the defendant was out of custody and the court set a trial date for

August 5, 2013. *Id.*

In preparation for trial in this case the defendant's attorney arranged to interview Trooper O'Connor in the office of the deputy prosecutor assigned to the case. CP 159-163. During that interview Trooper O'Connor gave his version of the events on February 25th. *Id.* He also mentioned that not long after clearing the encounter with the blue truck he stopped to see about a second truck that he thought might be disabled. *Id.* He did not claim that he believed that the second truck had anything to do with the stolen blue pickup. *Id.* However, as soon as the interview was over and the defense attorney had left the office, Trooper O'Connor told the prosecutor in charge of the case that he did believe that the two trucks were associated in the theft of the blue pickup. *Id.*

The deputy prosecutor in charge of the case did not inform the defendant's attorney of the new information that Trooper O'Connor revealed to him right after the defense interview. CP 159-163. Rather, the first time the defense heard of this claim was during the following portion of the prosecutor's opening statement at the trial that began on August 20, 2013.

> He initially saw this second truck pull by him at a slow rate of speed, but it stopped up there and put on its flashers. He's completed the first stop. Nothing amiss that he can tell at this point, other than giving the defendant a verbal warning for not having his license on him and for a lane violation that he witnessed. Trooper O'Connor pulls up behind the second truck. And he will tell you, the flashers were on; that truck didn't move that entire time; it was in his sight

> that entire time that he dealt with the first truck. And Trooper O'Connor will tell you that he went up to that second truck and offered his assistance. That's what they do.
>
> He approached the vehicle and he noticed that the driver was sitting there and the cell phone -- and there was a cell phone on the bench seat next to this driver.
>
> The trooper offers his help, how are you doing, and he will testify that the person just indicated they're making a phone call. The trooper had no reason to suspect anything was going on. He bid that second driver a good night. He's done his duty. Everyone is okay. The trooper moves on, goes about the rest of his shift that night, goes home, goes to sleep.

RP 8/20/13 36-37.

Following the testimony of the first witness in this case the defendant's attorney objected on the basis that the state had violated the discovery rules by failing to disclose the Trooper's claims that the second truck was involved in the theft of the blue pickup. RP 8/20/13 52-72. The state responded to this argument denying any discovery violation. RP 8/21/13 74-82. The state then put the Trooper on the stand to present testimony on the issue. RP 8/21/13 84-110. Following this testimony and further argument by counsel the court found that the state had violated the discovery rules. RP 8/21/13 110. The defendant then moved to dismiss the charges. RP 8/21/13 124-131. The court denied the motion. RP 8/21/13 152. However the court did give the defense the option of moving for a mistrial or accepting a limiting instruction. RP 8/21/13 152-154. The

defense opted for the former and the court declared a mistrial. *Id.* The court later entered the following Findings of Fact and Conclusions of Law on the defendant's motion to dismiss:

FINDINGS OF FACT
A. February 25, 2013 Incident

1. On February 25, 2013 Trooper O'Connor pulled over a blue Toyota pick up truck for failure to signal as it entered the highway from the off ramp. Later that day the vehicle was reported stolen. Trooper O'Connor spoke with Officer Sabado and informed him about the contact. Officer Sabado's report indicated that Trooper O'Connor mentioned another vehicle appeared to be waiting in the area. The license number of that vehicle was provided. Trooper O'Connor's report did not mention the second vehicle.

B. June 17, 2013 Interview

2. On June 17, 2013 defense counsel interviewed Trooper O'Connor concerning the events of February 25, 2013. Deputy Prosecutor Robert Davy was present for that interview. Defense counsel asked Trooper O'Connor to tell her about what he remembered about February 25th just prior to 1:00. Trooper O'Connor stated: "I was traveling southbound on State Route 3, just north of Finn Hill. It's approximately milepost 52 traveling south. Under Finn Hill there, I observed a small pickup truck using the on-ramp from Finn Hill to South 3. I observed the vehicle not use its turn signal. I stopped the vehicle and made my contact with the driver." The trooper then discussed the contact with the driver of that pickup truck.

3. After describing the contact, Trooper O'Connor then stated: "I cleared the stop. Jeffrey - the driver of the Toyota exited back on the highway and continued to patrol that night."

4. Defense counsel asked the Trooper if he had contact with someone else about that time and the trooper stated that he had contact with a vehicle he categorized as a disabled vehicle just after his contact with the blue pickup truck. No other information was

provided.

5. Because a second vehicle had been mentioned in Sabado's report, defense counsel attempted to follow up on that and was not able to find the driver, but was interested in the second vehicle because there could have been some exculpatory information that could have been provided.

6. Based on the interview with Trooper O'Connor, defense counsel did not follow up further believing that information was a dead end and not relevant to the incident.

7. After the interview with defense counsel, Trooper O'Connor had further conversation with DPA Davy that was not in the presence of defense counsel. DPA Davy fleshed out more information concerning the second vehicle. DPA Davy was aware that defense counsel did not have information as it was not disclosed in any police report and he was present for the interview with defense counsel just months before. DPA Davy knew that defense counsel did not have the additional information, however, DPA Davy did not disclose that information to defense counsel.

C. Opening Statement August 20, 2013

8. Mr. Davy stated in his opening statement: "There was a second truck present just behind the truck that Mr. Robinson was driving. Trooper O'Connor is going to tell you that he thought it was odd at the time, being hardly any traffic, if at all, at one o'clock in the morning on a Sunday night in Poulsbo, or just south of Poulsbo on the highway , and that the second truck did a slow roll-by-didn't get over in another lane, even though that lane was open - did a very, very, slow roll-by of the officer who had stopped this vehicle. Estimates 10, 15, 20 miles an hour on a 60-mile-an-hour highway. Trooper O'Connor will tell you the second truck continued on, approximately, a quarter mile, half a mile just down the road, but that it's a straight road and it's a clear road, and that he can see that second truck pulls over and turns on its flasher while Trooper O'Connor was conducting a traffic stop with this first truck, the defendant's truck. He initially saw this second truck pull by him at a slow rate of speed, but it stopped up there and put on its flashers. He's completed the first stop. Nothing amiss that he can tell at this

point, other than giving the defendant a verbal warning for not having his license on him and for a lane violation that he witnessed. Trooper O'Connor pulls up behind the second truck. And he will tell you that he went up to that second truck and offered his assistance....He approached the vehicle and he noticed that the driver was sitting there and the cell phone - and there was a cell phone on the bench seat next to the driver."

9. In describing count II, theft of a motor vehicle, Mr. Davy says: "The trooper will tell you that he is sure that it's the right guy. But what's additional with Count II is the State will bring evidence that shows you, circumstantially, that the defendant took the vehicle from that lot, which is why he was in such close proximity to the victims' home at the time that he did, what was in the car, what the other truck was doing, and why all of that together will show you beyond a reasonable doubt that the defendant also stole that truck from the Stevensons."

D. Voir Dire of Trooper O'Connor August 21, 2013

10. Trooper O'Connor testified that immediately after the interview with defense counsel in June, that he and Mr. Davy had a conversation wherein more information was fleshed out concerning the tan pickup truck, such that the tan pick up truck was entering onto Highway 3 with the other vehicle; that the trooper, in stopping the blue Toyota, had to get between the two vehicles to effect the stop; that he saw the second vehicle traveling very slowly past the first vehicle, such that his opinion is that they were traveling together.

11. There was nothing in defense counsel's interview or in Officer Sabado's report that reveals that Trooper O'Connor saw these two cars traveling together off the on-ramp, that he had to get between them to effect the stop of the Toyota, that the driver of the brown car drove slowly past the trooper, which was unusual, or that the trooper felt or opined that the two were connected in any way, shape or form.

12. In defense counsel's interview with Trooper O'Connor, hearing nothing about the second vehicle when he described his initial contact with the Toyota, asked Trooper O'Connor if he had contact with anyone else. Trooper O'Connor's response was entirely

consistent with the information previously disclosed by prosecutor's to the defense. No information was ever disclosed prior to the trial that would lead defense counsel to believe that the two vehicles were traveling together or that there was a suspicion that they were connected to each other. Defense counsel would not and could not have known that information in her follow up with the trooper in his interview.

13. The state intended to elicit from Trooper O'Connor his opinion concerning the second vehicle and the signs that the two were traveling together and that in his opinion the second vehicle acted as a disable vehicle in order for the first vehicle to get away clean. The state did not disclose that he intended to elicit this opinion from Trooper O'Connor.

CONCLUSIONS OF LAW

1. That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

2. Criminal Rule 4.7(a) requires under (a)(1), that the prosecutor has the obligation to disclose to the defense the names and addresses of persons to whom the prosecuting attorney intends to call as witnesses as the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses.

3. Under paragraph (2) (ii) the prosecutor is obligated to disclose any expert witnesses whom the prosecutor intends to call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney.

4. The prosecutor did disclose to defense counsel that they intended to call Trooper O'Connor. There were statements that were taken by others, after conversation with Trooper O'Connor, that were reflected in the record. The State met its initial burden with respect to the discovery rule CrR 4.7 (a)1(I).

5. Eliciting an opinion from the State Patrol officer falls within the ambit of ER 702 wherein a trooper may render an opinion based upon their experience and training about certain issues which may be relevant in the case. The state is obligated to disclose that

information to defense counsel.

6. Criminal Rule 4.7(h)(2) subjects the state to a continuing duty to disclose. If after compliance with the rules or orders, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material.

7. The information disclosed by the Trooper after the defense interview was subject to disclosure. It was material information the state intended to use to prove its theory of the case. This failure to disclose is a violation of CrR4.7(h)(2).

8. The court may suppress the evidence, declare a mistrial, or dismiss the case.

9. The court denies defense request to dismiss the case as that is a harsh sanction.

10. The defense may choose between suppression of evidence or mistrial.

11. The information given to the jury does ring a bell with respect to the second driver and how they would hear, at the end of the case, how the second driver comes into play with the theft of the motor vehicle.

12. The court grants a mistrial.

CP 159-163.

One month later on September 30, 2013, the case was called again for trial. At this time the state called three witnesses: Jacqueline Stevenson, the owner of the stolen pickup, Trooper James O'Connor and Sergeant John Halsted. RP 43, 52, 111. The defense then called four witnesses: Officer Sabado, the defendant's step-mother, a friend of the defendant and the

defendant himself. Both the state's witnesses and the defendant's witnesses testified to the facts contained in the preceding factual history. *See* Factual History, *supra*.

After the reception of evidence in this case the court instructed the jury without objection or exception from either party. RP 257, 259; CP 120-134. Following argument by counsel and deliberation the jury returned a guilty verdict. RP 260-311; CP 135. The court later sentenced the defendant within the standard range after which the defendant filed timely notice of appeal. CP 146-156; 158.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATE'S FAILURE TO MEET THE DISCOVERY REQUIREMENTS OF CrR 4.7 AND *BRADY v. MARYLAND* CONSTITUTED MISCONDUCT THAT DENIED THE DEFENDANT HIS RIGHT TO A SPEEDY TRIAL.

As was mentioned in the previous argument, while due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *Bruton v. United States,* 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, (1968) ; *State v. Swenson,* 62 Wn.2d 259, 382 P.2d 614 (1963). The due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order *in limine* precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not

to impose the death penalty. The defendant appealed his sentence, arguing that this claim by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence. The court held:

> Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion *in limine* was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

This constitutional right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, also includes the right to be appraised of the state's evidence with sufficient time to adequately investigate and prepare to answer it, and is embodied in CrR 4.7 and the decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). As the Washington Supreme Court held in *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993),

> The prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant. CrR 4.7(a)(3). Failure to do so will generally be held to violate the accused's constitutional right to a fair trial.

State v. Blackwell, 120 Wn.2d at 826.

For example, in *State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992), the defendant was charged with manufacturing marijuana after the police flew over his property, saw marijuana, obtained a search warrant, and then arrested him while executing the warrant. In fact, the defendant's son-in-law had given the police the initial tip about the grow operation in return for a payment of $50.00, for which he gave the police a receipt. The defense was unaware of this fact because no informant was mentioned in the police reports or in the affidavit given in support of the warrant.

At trial, the defense called the son-in-law as a witness, and he testified that he was familiar with the defendant's property, and there had been no marijuana on it. The state then impeached the son-in-law with his statements to the police and the receipt he had signed. Upon hearing this information, the defense moved for a mistrial based upon the state's failure to provide discovery of the son-in-law's role and the receipt. The trial court initially denied the motion. However, after the jury returned a guilty verdict, the court granted a defense motion for a new trial on this basis. The state appealed.

In addressing the issues presented, the court first noted the following

concerning the state's duty of discovery:

> It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process ..." *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub. Co. ed. 1971)). To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense.

State v. Dunivin, 65 Wn.App. at 733.

The court then affirmed the trial court's decision to grant a new trial, noting that the state's failure to disclose the information concerning the son-in-law along with the receipt violated both the defendant's right to discovery under CrR 4.7, as well as his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

In the case at bar there should be little argument by the state claiming that it did not commit flagrant misconduct when it knowingly failed to meet the requirements of both CrR 4.7 and *Brady v. Maryland*. The facts as found by the trial court reveal a compelling juxtaposition of four facts. They were: (1) that defense counsel specifically interviewed Trooper O'Connor about the presence of the second vehicle in order to determine whether or not there was a claim that it had any involvement with the stolen vehicle a connection that

Trooper O'Connor disavowed, (2) right after defense counsel left the interview Trooper O'Connor told the prosecutor that he did believe there was a connection between the two vehicles, (3) the prosecutor knowingly failed to reveal this claim to defense counsel, and (4) the prosecutor specifically used this claim as an important part of his case as revealed for the first time in opening statements. These facts compel one conclusion: that the prosecutor intentionally violated the discovery rules in order to ambush the defense at trial. This action constituted a flagrant misconduct. As the following explains, this misconduct caused the defendant prejudice in that it prevented him from having a speedy trial as is guaranteed under CrR 3.3.

Under CrR 3.3(b)(2)(i), the time for trial for a person held in jail is "90 days after the commencement date specified in this rule," or "the time specified under subsection (b)(5)." Under CrR 3.3(h), "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to prevent the undue and oppressive passage of time prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a showing of good cause if such continuance is "required in the administration of justice" and it will not prejudice the defendant. This section states:

> (f) Continuances. Continuances or other delays may be granted as follows:
>
> . . .
>
> (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen*, *supra*, a defendant was convicted of a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact the state had no evidence linking the defendant or

his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the Court of Appeals first acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

> The suspicion that a link will "potentially" be discovered between the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as "required in the administration of justice." The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

State v. Nguyen, 131 Wn.App. at 820-821.

In the case at bar, the defendant was arraigned on May 20, 2013. Since he was out of custody the trial court set his trial date for August 5, 2013, some 76 days after arraignment. The court later continued this trial date to August 12, 2013, at the state's request in order to facilitate the vacation schedule of one of the state's witnesses. *See* Motion to Continue Trial, CP 43-44. The new trial date was 83 days after arraignment and still within the time for trial under CrR 3.3. However, once the state presented its opening statement and revealed the information it had failed to give to the defense, the defendant was put to the Hobson's choice of either waiving speedy trial via the new time period that would arise upon a mistrial in order to have time to adequately prepare (thereby being forced to give up the right to speedy trial) or refusing to waive speedy trial by continuing with the trial without adequate preparation (thereby being forced to give up the right to effective assistance of counsel). The following examines the law on this issue.

In *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), the defendant was charged with two counts of second degree theft under a probable cause statement that alleged that he had stolen a rifle, a fish-finder, and a scanner out of a house in which he was staying. According to the probable cause statement, the defendant later pawned all three items, two at

one pawn shop and the third at another. Three days before trial and without prior notice to the defense, the court allowed the state to amend the information to charge a third count of theft (for the third item), and three counts of trafficking in stolen property (for pawning the three items).

The defense later moved to dismiss the added charges, arguing in part that it was unprepared to respond to them, thus putting the defendant in the unfair position of either having to give up his right to speedy trial or give up his right to effective assistance of counsel. The trial court granted the motion, and the state appealed the dismissal of the amended charges. Following argument, the Court of Appeals reinstated the third theft charge, but affirmed the dismissal of the three trafficking charges on a separate legal theory. The state then obtained review before the Supreme Court.

Ultimately, the Supreme Court affirmed the decision of the Court of Appeals that the trial court properly dismissed the three trafficking charges. However, it did so on the basis that the dismissal was proper under CrR 8.3(b), which allows the trial court to dismiss a charge "on its own motion in the furtherance of justice." In its analysis, the court noted that for a dismissal to be proper under CrR 8.3(b), the defense must prove (1) government misconduct that (2) causes prejudice to the defendant's case. As to the second criteria, the court held:

The state, by adding four new charges just before the scheduled

> trial date, without any justification for the delay in amending the information, forced Mr. Michielli either to go to trial unprepared, or give up his speedy trial right. *See also State v. Sulgrove*, 19 Wn.App. 860, 578 P.2d 74 (1978) (charge dismissed under CrR 8.3(b) after the State charged the wrong crime, amended to correct it the day before trial after defense motioned for dismissal, and then failed to produce necessary evidence to support the correct charge on the day of trial).

State v. Michielli, 132 Wn.2d at 245.

The exact same prejudice existed in the case at bar. By failing to provide discovery as required under the court rule and the constitution, and by ambushing the defense with the withheld information, the state forced the defendant to either accept a mistrial and the continuance of the trial date, or proceed to trial unprepared. In doing this the state caused prejudice to the defense. Thus the trial court erred when it denied the defendant's motion to dismiss for prosecutorial misconduct.

CONCLUSION

The prosecutor committed misconduct when he knowingly failed to provide discovery as required under both the court rule and the constitution. Since this misconduct prejudiced the defendant's right to speedy trial, this court should vacate the defendant's conviction and remand with instructions to dismiss with prejudice.

DATED this 24 day of March, 2014.

Respectfully submitted,

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Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,**	**NO. 45496-3-II**
vs.	**AFFIRMATION OF SERVICE**
JEFFERY ROBINSON, **Appellant.**	

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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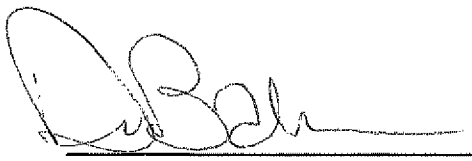
Dated this 21st day of March, 2014, at Longview, Washington.



Donna Baker

HAYS LAW OFFICE

March 21, 2014 - 10:11 AM

Transmittal Letter

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Court of Appeals Case Number: 45496-3

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